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IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

At Charleston

STATE OF WEST VIRGINIA,

Plaintiff below, Appellee,

v. No. 35441

JESSICA JANE MORRIS,

Defendant below, Appellant.

BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

On Appeal from the
Circuit Court of Ohio County, West Virginia,
The Honorable James P. Mazzone, presiding
Ohio County Case Number 08F17

Gail W. Kahle, #6109
Jenna Perkins Wood, #6983
Assistant Prosecuting Attorneys
Ohio County Prosecutors Office
1500 Chapline Street
Wheeling, WV 26003
(304) 234-3631
Counsel for Appellee

TABLE OF CONTENTS

I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW 1

II STATEMENT OF FACTS 2

III ARGUMENT

A THE TRIAL TESTIMONY OF R.M.'S FOSTER MOTHER SALLY KEEFER WAS PROPERLY ALLOWED BY THE CIRCUIT COURT. 5

1. APPELLANT'S SIXTH AMENDMENT RIGHTS WERE NOT IMPLICATED BY THE TRIAL TESTIMONY OF SALLY KEEFER. . . 7

2. THE TESTIMONY OF SALLY KEEFER WAS ADMITTED FOR REASONS OTHER THAN THE TRUTH OF THE MATTER ASSERTED, THEREFORE APPELLANT'S ASSIGNMENT OF ERROR IS COMPLETELY MISPLACED 8

B. THE TRIAL COURT PROPERLY SUSTAINED THE STATE'S OBJECTIONS TO APPELLANT COUNSEL'S QUESTIONING OF VICTIM R.M. REGARDING OTHER ALLEGATIONS OF SEXUAL ABUSE MADE BY THE VICTIM R.M. 12

C. THE TRIAL COURT PROPERLY SUSTAINED THE STATE'S OBJECTIONS TO DEFENSE COUNSEL'S IRRELEVANT QUESTIONING OF THE CHILD VICTIM R.M.'S COMPETENCY WHEN DEFENDANT HAD FAILED TO PLACE BEFORE THE COURT EVEN A SCINTILLA OF EVIDENCE TENDING TO SUGGEST THAT THE CHILD LACKED COMPETENCY.. .16

D. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO RECUSE THE OHIO COUNTY PROSECUTOR'S OFFICE WHEN THE FACTS AS REPRESENTED BY APPELLANT WERE NOT TRUE, AND EVEN HAD THEY BEEN APPELLANT WOULD NOT HAVE BEEN ENTITLED TO HER REQUESTED RELIEF. 20

IV CONCLUSION AND RELIEF REQUESTED 25

POINTS AND AUTHORITIES

West Virginia Statutory Law

1. Code 61-8B-11 . . . . . 13, 18

West Virginia Common Law

Page

1. State v. Wears, 222 W.Va. 439, 665 S.E.2d 273, (2008) 2, 14
2. State v. Pettry, 209 W.Va. 449, 549 S.E.2d 323 (2001) 5, 6, 8-11
3. State v. James B.,Sr., 204 W.Va. 48, 511 S.E.2d 459 (1998) 11
4. State v. Calloway, 207 W.Va. 43, 528 S.E.2d 490 (1999). 11
5. State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83 (1999) 11,12
6. State v. Quinn, 200 W.Va. 432, 490 S.E.2d 34 (1997) 13-15
7. State v. Ayers, 179 W.Va. 365, 369 S.E.2d 22 (1988). 16
8. State v. Hoke, 76 W.Va. 36, 84 S.E.2d 1054, (1915) 18
9. State v. Mallick, 457 S.E.2d. 482, 193 W.Va. 545 (1995) 20
10. State v. Keenan, 213 W.Va. 557, 584 S.E.2d 191, (2003) 20
11. Nicholas v. Sammons, 178 W.Va. 631, 363 S.E.2d 516, (1987) 22

West Virginia Rules

1. West Virginia Rules of Evidence Rule 803 (4) 8-9
2. West Virginia Rules of Evidence, Rule 801(c) 10
3. West Virginia Rules of Evidence, Rule 601 18

Federal Common Law

1. Crawford v. Washington, 541 U.S. 36 (2004) 7-8
2. Barbe v. McBride, 521 F.3rd 444, (4th Cir. 2008) 14-16
3. United States v. Odom, 736 Fed.2d 104, (4th Cir. 1984) 18

Other Authorities

1. Cleckley, F., Handbook on Evidence for West Virginia Lawyers, 4th Ed., §6-1(C)(1) . . 18

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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW.

This is an appeal by Jessica Jane Morris (hereinafter referred to as "Appellant") from the January 14, 2009, Order of the Circuit Court of Ohio County, West Virginia (Mazzone, J.) sentencing her to serve not less that one hundred one (101) years, and not more than two hundred thirty five (235) upon her convictions for one (1) count of "Conspiracy" in violation of Code §61-10-31; three counts of "Sexual Assault in the First Degree" in violation of Code §61-8B-3(a)(2); four (4) counts of "Sexual Abuse by a Parent" in violation of Code §61-8D-5(a); and three (3) counts of "Incest" in violation of Code §61-8-12(b). The Circuit Court Ordered all sentences to run consecutively.

Appellant filed no post-trial motions for relief, nor did she file any "Notice of Intent to Appeal" as required by Rule 37(b) W. Va. Rules Crim. Proc. On appeal, Appellant claims that the circuit court committed various errors, denying her a fair trial.

II.

STATEMENT OF FACTS

R.M. [1] was born on December 28, 1998, and is the biological daughter of the Appellant. (Record, Vol. III, trial transcript, Volume II at 188)[2]. She resided with her mother until she was removed from the home in February 2006, by virtue of an emergency order of the Circuit Court of Ohio County, based upon allegations of abuse and neglect, wholly unrelated to the crimes for which Appellant now stands convicted..

R.M. was shuffled through various foster families eventually winding up in the home of Sally Keefer, in August of 2006. (Record, Vol. III, trial transcript Vol. I-continued, at 7). While at the Keefer residence, and particularly beginning in September 2006, Ms Keefer began to notice overtly sexual behaviors of R.M., who was at that time only seven years old. (Id at 11-12). Thereafter R.M. began to make disclosures to Ms. Keefer of explicit sexual acts performed upon her by her mother, Appellant herein, and her mother's paramour, Mr. Jack James Jones. (Id at 16-19). Ms. Keefer, disturbed by these revelations, and after consultation with R.M.'s

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[1]In accordance with State v. Wears, 222 W.Va. 439, 441 n. 1, 665 S.E.2d 273, 275 n. 1 (2008), Appellee will refer to the victim in this case by only her initials.

[2]Citations to the record have been difficult in this appeal. The appellate record consists of three volumes each consisting of approximately eight hundred pages. Only volume one of the three volumes is partially (approximately 2/3) indexed and paginated. Counsel has attempted to point the Court to the record cited as best as can be given the nature of "organization" of the record presented to the Court.

caseworkers from the West Virginia Department of Health and Human Resources (hereinafter referred to as "WVDHHR") began keeping a "log" or "diary" of disclosures made to her by R.M. (Id at 13-14).

On account of the disclosures made to Sally Keefer, as well as Michelle Hogan, R.M.'s caseworker, the WVDHHR made an appointment for R.M. to be examined at Women's and Children's Hospital in Charleston, West Virginia. There R.M. underwent a forensic interview with Maureen Runyon in late 2006 (Id at 123) as well as a physical and vaginal examination by Dr. Joan Phillips which indicated "clear evidence of a penetrating trauma" to the child's vaginal area. (Id at 201) . These professional evaluations were consistent with a child who had experienced sexual trauma and abuse.

R.M. then began a long course of recovery which has included therapy and in-patient residential treatment. Among others R.M. treated at the Pomegranate Center in Byesville Ohio, where she was treated on an in-patient basis for five months. (Record, Vol. III, trial transcript Volume II at 145-146). Throughout her history of treatment and recovery R.M. continued to make consistent disclosures of sexual molestation at the hands of her mother and her mother's paramour, Mr. Jack James Jones.

The January 2008 Term of the Ohio County Grand Jury was a presented a case against Appellant. They returned a true bill indictment charging Appellant with one count of Felony Conspiracy, four counts of Felony Sexual Assault in the First Degree, five counts of Felony Sexual Abuse by a Parent or Custodian, and four counts of Felony Incest. (See Record, Vol. I at 1). The case proceeded through a course of discovery and motion practice which included several pre-trial evidentiary hearings; including a February 11, 2008 hearing on Appellant's "Motion to

Disqualify and/or Recuse the Ohio County Prosecutor's Office from the Jessica Jane Morris Criminal Case;" an April 1, 2008 hearing on Appellant's "Motion to Dismiss Indictment in Criminal Case No. 08-F-17 as Constitutionally Insufficient," "Motion for Bill of Particulars Pursuant to Rule 12(b)(4) and Rule 7(f)of the West Virginia Rules of Criminal Procedure,"and "Motion for In Camera Hearing of State's Witness R.M. and any Other Minor Child that the State Intends to Call at Trial or Use Their Statements;" an April 10, 2008 hearing on Appellant's "Motion to Disqualify and/or Recuse Joseph Moses, Esq. as Guardian ad Litem for the Morris Minor Children in this Criminal Matter"(at which time the Appellant again argued her Motion to Recuse) and again Appellant's "Motion to Dismiss Indictment in Criminal Case No. 08-F-17 as Constitutionally Insufficient;" and an April 30, 2008 hearing on Appellant's "Motion to Draw Blood from Jack Jones and Alleged Victim 'R.M.' for the Purpose of Determining if Highly Contagious Venereal Disease (Genital Herpes) was Transmitted from Jack Jones to the Alleged Victim 'R.M.'" at which time various discovery issues were discussed.

The matter proceeded to trial by a jury of twelve and one alternate commencing the 8th day of October 2008. At the conclusion of the State's case in chief Appellant's counsel moved for a directed verdict of acquittal. (Record, Vol III, Trial Transcript, Volume 2 at 228-29). The State conceded as to three counts of the indictment (counts five, ten and fourteen) and Appellant's Motion was granted as to those counts. (Id at 232). The Circuit Court denied Appellant's motion as to the remaining counts of the Indictment. (Id at 236-37).

Appellant presented her case, and the matter was submitted to the jury for its deliberation. On October 10, 2008 the jury returned a unanimous verdict finding Appellant guilty of one (1) count of "Conspiracy" in violation of Code §61-10-31 ; three counts of "Sexual Assault in the

First Degree" in violation of Code §61-8B-3(a)(2) ; four (4) counts of "Sexual Abuse by a Parent" in violation of Code §61-8D-5(a) ; and three (3) counts of "Incest" in violation of Code §61-8-12(b). (Id at 167-72).

Subsequent to the entry of the verdict order, Appellant failed to file any motions seeking post-trial relief. After the completion of a Pre-Sentence Investigation Report, the Court conducted a sentencing hearing on December 18, 2008, at which time the Circuit Court Ordered Appellant to serve not less that one hundred one (101) years, and not more than two hundred thirty five (235) in prison upon her convictions.

III.

ARGUMENT.

A. THE TRIAL TESTIMONY OF R.M.'S FOSTER MOTHER SALLY KEEFER WAS PROPERLY ALLOWED BY THE CIRCUIT COURT

STANDARD OF REVIEW

`` `Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' State v. Louk, 171 W.Va. 639, 643, 301 S.E.2d 596, 599 (1983).' Syllabus Point 2, State v. Peyatt, 173 W.Va. 317, 315 S.E.2d 574 (1983)" Syllabus Point 1, State v. Pettry, 209 W.Va. 449, 549 S.E.2d 323 (2001).

DISCUSSION.

R.M.'s foster mother, Sally Keefer testified during the trial of this matter. At the time of the trial (October 2008) R.M. had resided in Ms. Keefer's home for a little over two years. (Record, Vol. III, trial transcript, Vol. I at 7). Ms. Keefer began to become concerned as regards R.M. when on September 21, 2006, she witnessed R.M., then aged seven, "french-kissing" her

younger brother at bedtime. (Id at 11).

Ms. Keefer continued to witness inappropriate behaviors on R.M.'s behalf and R.M. eventually began making disclosures of sexual activities involving herself, the Appellant and the Appellant's boyfriend. (Id at 11 - 14). Eventually Ms. Keefer, after consultation with R.M.'s WVDHHR case worker[3] and therapist she began keeping a journal of the nature of the disclosures of sexual abuse that R.M. was making to her. (Id at 14). It was clear from Ms. Keefer's trial testimony that the purpose of her gathering and documenting the information provided by the child victim R.M. was so that Ms. Keefer could utilize the substance of these disclosures to R.M.'s case workers and therapists so that she could be rendered necessary medical and psychological care and treatment. (Id p.14, lines 10 - 12).

At trial the State attempted to introduce the hearsay statements that R.M. made to Sally Keefer regarding detailed and disturbing sexual assaults committed upon her by her mother and her mother's co-conspirator Jack Jones, which raised a hearsay objection by Defense counsel.

At first the State suggested that the testimony should be admitted pursuant to Rule of Evidence 803 (4) and Syllabus point 9 of State v. Pettrey. (Record Vol. III, trial transcript, Vol. I, cont. at 19-20). While Appellee suggests that the statements could have properly been admitted pursuant to 804 (3) and Syllabus point 9 of Pettrey, the Circuit Court disagreed. Accordingly the

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[3]At various places in her Appellate Brief Appellant severely misstates who Sally Keefer was, and why she kept a journal. At p. 17 of her brief it is stated "Sally Keefer, testified that she was employed by the [WVDHHR] and was keeping a lot of [R.]M.s statements for the purposes of reporting them to agents of the state acting under the auspices of the Ohio County Police agencies and Prosecutor's Office." At p. 19 it is stated "Sally Keefer was and is an employee of the State of West Virginia and her questioning of [R.]M. Was for the purpose of furthering a criminal investigation." These statements are simply untrue and the record contains no support for these "factual" statements by Appellant.

State then offered the testimony of Ms. Keefer not to prove the truth of the matter asserted, but rather offered them to prove the advanced sexual knowledge of the seven-year-old declarant. (Id at 22-24).

It is unclear from Appellant's brief exactly why error has been assigned to Judge Mazzone's admission of the testimony of Sally Keefer, as her brief is difficult to follow. Nevertheless, the State gathers that the thrust of Appellant's complaints as to the testimony are that 1) it was inadmissible hearsay; and 2) it was violative of Appellant's rights to confront and cross examine as secured by the Sixth Amendment to the United States Constitution. Each of these assignments of error fails, however, under scrutiny.

1. APPELLANT'S SIXTH AMENDMENT RIGHTS WERE NOT IMPLICATED BY THE TRIAL TESTIMONY OF SALLY KEEFER.

Appellant devoted a large portion of her brief in reciting extended direct quotes from the case of Crawford v. Washington, 541 U.S. 36 (2004), and the Crawford Court's discussion of the subtle distinctions and differences between "testimonial" and "non-testimonial" hearsay. This is a fine discussion, however, it really has no bearing on the admission of the trial testimony of Sally Keefer in the Appellant's underlying matter.

In Crawford, Justice Scalia writing for a unanimous Court, first examined the historical common law issues surrounding a criminal accused's right to confrontation of witnesses against him. After setting forth the historical context, and discussing the differences between "testimonial" and "non-testimonial" hearsay the Court concludes that "testimonial hearsay" cannot be introduced in a criminal trial without the presence of the out of court declarant, regardless of well-rooted hearsay exceptions; while "non-testimonial" hearsay can be admitted

in a criminal trial, assuming there exists sufficient indicia of reliability (such as a well-rooted hearsay exception).

In the case at bar, R.M. was the out-of-court declarant, and R.M. ***testified*** at trial. Appellant's right to confront and cross-examine was satisfied because she did confront and cross-examine her accuser, R.M. While this is somewhat of an oversimplification of the holdings in Crawford, it is all that is necessary to dispense with this point of "error" as it appears that Appellant does not comprehend that Crawford is inapplicable when the declarant is available and actually testifies at trial.

An additional argument raised by Appellant as impacting upon her right of confrontation is the fact that one Assistant Prosecutor questioned Ms. Keefer, and R.M. was questioned by a different Assistant Prosecutor. Her counsel goes so far as suggesting that somehow this was a misrepresentation of fact to the Court, and further that the State's attorneys "knew that [R.M.'s] testimony would contradict that of Sally Keefer . . .." Appellant's Brief at 18.

Counsel for the State did in fact point out to the trial Judge that R.M. would testify at trial. (See Record Vol. III, trial transcript, Vol. I, cont. at 21, 24). This was done for the purpose of eliminating any Crawford "testimonial v. non-testimonial" analysis as a pre-requisite for the sought admission of the hearsay testimony of Sally Keefer. Appellant's complaints over which Assistant Prosecutor questioned which witness are simply bizarre, not supported by any authority, and surely not an error committed by the trial Court.

2. THE TESTIMONY OF SALLY KEEFER WAS ADMITTED FOR REASONS OTHER THAN THE TRUTH OF THE MATTER ASSERTED, THEREFORE APPELLANT'S ASSIGNMENT OF ERROR IS COMPLETELY MISPLACED.

As previously discussed the State during the trial of the underlying matter sought to introduce pursuant to West Virginia Rule of Evidence Rule 803 (4) and syllabus point 9 of State v. Pettrey the disclosures made by R.M. to Sally Keefer of the sexual assaults by Appellant and Jack Jones. This proffered reason was not accepted by the Court, and the State feels that this decision was wrongly made by the Circuit Court. Rule 803 (4) at relevant part states "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (4) . . . Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause of the external source thereof insofar as reasonably pertinent to diagnosis or treatment."

As discussed above, Ms. Keefer was gathering the evidence disclosed in the challenged testimony exactly for that purpose: "Q. So you documented these things for purposes of medical diagnosis and treatment? A. Right." (Record, Vol. III, trial transcript, Vol. I, cont. at 14.)

The Pettrey case in some aspects presents facts similar to those presented herein. The Appellant in Pettrey challenged the trial Court's admission of several extra judicial disclosures of sexual abuse by child victims of the Appellant to various players, including a school teacher, a counselor, and the victims' grandmother. Pettrey 549 S.E.2d at 327. The Court ruled that the statements made to the counselor were admissible pursuant to a Rule 803 (4) analysis as the statements by the declarant were made with a motive consistent with promoting medical treatment. Id at syllabus point 9. The statements made to the victims' school teacher ("the appellant made [the victim] lie down for 'daddy to suck his wiener'", Id at 328) were likewise admissible - albeit not for the truth of the matter asserted - but rather to show why the teacher - a

mandatory reporter - had reported the incident. Id at 330.

Unlike the case presented in Pettrey in the underlying case Ms. Keefer was taking the statements of R.M. in late 2006 for the purpose of conveying the same unto R.M.'s counselor and case worker so that R.M. could be rendered the care and treatment needed on account of the abusive behaviors that she had suffered. The State submits that Judge Mazzone erred by not allowing the statements to be admitted for any reason under the Rule 803 (4) hearsay exception.

Nevertheless the trial Court limited the purpose for the admission of the statements - that being to show the advanced sexual knowledge of a seven year old child; and the Court on three separate occasions gave to the jury limiting instruction of the limited use of the testimony of Sally Keefer regarding the detailed disclosures made to her by R.M. (Record, Vol. III, trial transcript, Vol. I, cont. at 29, 32 and 33). The State later called two experts witnesses in their case in chief (Maureen Runyon and Sarah Wyer (misspelled in the transcripts as "Wire") who both opined that advanced sexual knowledge or knowledge beyond that appropriate for their age is an indicator present in child victims of sexual abuse. (Record Vol. III, trial transcript, Vol. I, cont. at 130-31, and trial transcript, Vol. II at 32.)

The testimony of Ms. Keefer, being limited for usage other than for the truth of the matter asserted, take the same out of the scope of "hearsay." "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." W.Va. R. E., Rule 801(c). This use of Ms. Keefer's testimony in the underlying case - being admitted not for the truth of the matter asserted is on all fours with that of witness Akers in the Pettrey case. In the Pettrey case Ms. Akers testified directly to detailed disclosures made by the child victims, and the Supreme Court of Appeals

found this to be a proper use of evidence given "the statements were admitted not to prove the truth of the matter asserted but rather to show why the teacher reported the incident . . .. Statements which are not offered for the truth of the matter asserted do not implicate the Sixth Amendment right to confrontation. [Citation omitted]." Pettrey 549 S.E.2d at 330.

A similar result was had in the case of State v. James B.,Sr., 204 W.Va. 48, 511 S.E.2d 459 (1998). Among other things on appeal in this case was the convicted child rapist's challenge to the trial court's admission in evidence of disclosures made by the appellant's child victims to numerous individuals.

In James B. Sr. the trial judge allowed the testimony of Mrs. Nichols, the foster mother of the child sex abuse victims, and that of the investigating State Police Officer of detailed disclosures of sexual abuse and assault levied upon the victims. Id at 511 S.E.2d 462-63. The purpose of Mrs. Nichols and the trooper's testimony at trial was to

> show why the foster care mother and the trooper took the respective actions they took concerning the children. [Footnote omitted]. The trial court further instructed the jury to consider the child's statements for that limited purpose only. Because the statements were not offered to prove the truth of the matter asserted, the statements were not hearsay by definition and, therefore, the statements were properly admitted at trial.

Id at 511 S.E.2d 464-65.

In the case at bar, much like in the James B. Sr., Judge Mazzone allowed the testimony of Sally Keefer, the foster mother of R.M., to testify to the detailed disclosures of sexual abuse at her mother's hand, not for the truth of the matter asserted, but rather, as discussed above, to show the advanced sexual knowledge of the child victim.

The Appellant's assignment of error as to the testimony of Sally Keefer is misplaced.

B. THE TRIAL COURT PROPERLY SUSTAINED THE STATE'S OBJECTIONS TO APPELLANT COUNSEL'S QUESTIONING OF VICTIM R.M. REGARDING OTHER ALLEGATIONS OF SEXUAL ABUSE MADE BY THE VICTIM R.M.

STANDARD OF REVIEW

"The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syllabus Point 1, State v. Calloway, 207 W.Va. 43, 528 S.E.2d 490 (1999).

"[t]he test used to determine whether a trial court's exclusion of proffered evidence under our rape shield law violated a defendant's due process right to a fair trial is 1) whether that testimony was relevant; 2) whether the probative value of the evidence outweighed its prejudicial effect; and 3) whether the State's compelling interests in excluding the evidence outweighed the defendant's right to present relevant evidence supportive of his or her defense. Under this test, we will reverse a trial court's ruling only if there has been a clear abuse of discretion." State v. Guthrie, 205 W.Va. 326, 518 S.E.2d 83.

DISCUSSION

Appellant suggests in her second assignment of error that the trial judge abused his discretion when he sustained the State's objection to Defense Counsel's questioning of R.M. in the presence of the jury as to "how many different men did you have sex with?" The Appellant's assertion that she had the, "right and duty to explore the statements and facts set forth above and others through cross-examination the alleged victim, R.M." is completely inaccurate.

Section 61-8B-11 of the Code of West Virginia, commonly referred to as the Rape Shield Law provides in relevant part,

> (a) In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct

shall not be admissible.

The Rape Shield Statute was enacted to protect the victims of sexual assault from humiliating and embarrassing public fishing expeditions into their sexual conduct; to overcome victims reluctance to report incidents of sexual assault; and to protect victims from psychological or emotional abuse in court as the price of their cooperation in prosecuting sex offenders. State v. Guthrie, 518 S.E.2d 83, 205 W.Va. 326 (1999).

For counsel for the Appellant to pose this question to the 9 year old victim, R.M., was reprehensible. Counsel for Appellant misrepresents to this Court that R.M. made "apparent false accusations of rape against other family members and acquaintances." There is no evidence in the record that R.M. ever accused anyone other than co-conspirator Jack Jones of vaginal penetration or falsely accused anyone of sexual misconduct.

Counsel for Appellant falsely asserts that the Trial Court refused to hear any evidence that defense counsel wanted to proffer. Appellant never properly raised the issue. Appellant appears to argue that State v. Quinn, 200 W.Va. 432, 490 S.E.2d 34 (1997) is applicable, but failed to comply with the Quinn requirement.

> A defendant who wishes to cross-exam an alleged victim of a sexual offense about or otherwise introduce evidence about other statements that the alleged victim has made about being the victim of sexual misconduct must initially present evidence regarding the statements to the court out of the presence of the jury and with fair notice to the prosecution, which presentation may be in the court's discretion be limited to proffer, affidavit, or other method that properly protects both the rights of the defendant and the alleged victim and effectuates the purpose of our rape shield law, W.Va. Code §61-8B-11 and West Virginia Rule of Evidence 404(a)(3). *Syl. Pt. 3* of State v. Quinn 200 W.Va. 432, 490 S.E.2d 34 (1997).

In further quoting Quinn, ,

> Evidence that the alleged victim of a sexual offense has made statements about being the victim of sexual misconduct, other than the statements that the alleged victim has made about the defendant and that are at issue in the state's case against the defendant, is evidence of the alleged victim's "sexual conduct" and is within the scope of West Virginia's rape shield law, W.Va. Code, 61-8B-11 [1986] and West Virginia Rules of Evidence 404(a)(3) [1994], unless the defendant establishes to the satisfaction of the trial judge **outside of the presence of the jury,** [emphasis added] that there is a strong probability that the alleged victim's other statements are false. Quinn, *Syl Pt. 1.*
>
> Requiring strong and substantial proof of the actual falsity of an alleged victim's other statements is necessary to reasonably minimize the possibility that evidence which is within the scope of our rape shield law, W.Va. Code §61-8B-11 [1986] and West Virginia Rules of Evidence 404(a)(3), is not erroneously considered outside of the scope. Quinn, *Syl Pt. 2*

The Appellant fails in her argument that the excluded evidence was not within the scope of West Virginia's rape shield law pursuant to Quinn. Quinn involved an appeal by James Quinn of his conviction in the Circuit Court of Wetzel County for the offense of sexual misconduct toward a child by a custodian. At Quinn's trial, the presiding Judge ruled that the rape shield law prohibited the admission of evidence that the child victim had made other statements about sexual misconduct against her by other persons. At the time of the sexual misconduct by Quinn, the victim T.M. was five years old and lived with her mother and several siblings in Wetzel County.

Not unlike R.M, the home environment of T.M. included drunken parties that often ended in T.M.'s mother having sex with one of her numerous male friends. After Quinn was arrested and charged with sexual misconduct, T.M. began seeing a therapist and in the course of therapy made a number of statements which were recorded in therapy notes to the effect that T.M. had been the victim of sexual misconduct by several other persons, including a sibling and a grandparent.

The questions which were addressed in Quinn were (1) whether our rape shield law barred the jury at Quinn's trial from learning of T.M's statements about other persons allegedly molesting T.M.; and (2) whether the prior consistent statement rule permitted the jury to hear testimony about T.M's statements implicating Quinn appellant that T.M. made to her aunt and to a social worker. Both questions were answered in the affirmative.

Appellant failed to give adequate notice of prove that the accusations were false as necessary to reply on the falsity exception to the Quinn principal. See also State v. Wears, 665 S.E.2d 273 (2008).

Appellant also cites to the case of Barbe v. McBride, 521 F.3rd 444, (4th Cir. 2008), and quotes the same at length, buts fails to point out how any holding therein is applicable to the case at bar. Barbe is quite distinguishable to the instant case, insofar as there existed a legitimate reason therein to allow questions in derogation of the Rape Shield Law in that the State offered the opinion of an expert witness who opined that the victim therein "had in fact been sexually abused as a child because she fit the diagnostic criteria for post-traumatic stress disorder." Id at 446. Barbe was denied any opportunity to cross examine the State's expert about the victim's "sexual abuse by men other than Barbe—abuse that might have caused her psychological profile." Id.

The Barbe Court recognized that the state has an indisputably legitimate interest in having its Rape Shield Statutes enforced. Id at 459. The Barbe Court noted that this legitimate interest need be weighed against "the importance of the banned evidence" in allowing the Defendant an effective defense. Id.

Appellant, at the time of trial never indicated any legitimate reason that he wished to inquired

of a nine year old girl "how many different men did you have sex with?"[4] Never in her Petition for Appeal, nor in her Appellate Brief was there ever suggested any legitimate or relevant reason for a nine year old child to be questioned regarding her alleged molestation by persons other than Appellant and Jack Jones.

Appellant's Trial counsel was not prevented from bringing into evidence the allegations that she sought through the child witness. Maureen Runyon, one of the State's expert witnesses was cross examined at length regarding R.M.'s allegations of abuse at the hand of persons other than her mother or Jack Jones. Record Vol. III, Trial Transcript Vol. I - cont. at 171-191. Additionally, Dr. Joan Phillips was cross examined regarding R.M.'s allegations of abuse at the hands of others. Record Vol. III, Trial Transcript Vol. I - cont. at 207. The only "evidence" which Appellant was denied, was the ability to harass, humiliate and intimidate a nine year old little girl who had been repeatedly raped by her mother.

In Barbe the trial court drew a line in the sand and allowed no evidence of the victim's allegations of sex abuse by others to be admitted. In the case at bar, virtually all the victims allegations of abuse by others was in fact admitted and before the jury, Appellant simply was barred from beating up on a little girl.

The trial court rulings upon the admissibility, and manner of admission of allegations of R.M. of sexual abuse by those other than Appellant and Jack Jones were proper, and the Appellant has failed to show any abuse of discretion in the Court's rulings.

C. THE TRIAL COURT PROPERLY SUSTAINED THE STATE'S OBJECTIONS TO DEFENSE COUNSEL'S IRRELEVANT QUESTIONING OF THE CHILD VICTIM

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[4]The record contains very limited evidence of any abuse reported by R.M. at the hand of anyone else but Jessica Morris and Jack James Jones.

R.M.'S COMPETENCY WHEN DEFENDANT HAD FAILED TO PLACE BEFORE THE COURT EVEN A SCINTILLA OF EVIDENCE TENDING TO SUGGEST THAT THE CHILD LACKED COMPETENCY.

STANDARD OF REVIEW

"'The question of the competency of a witness to testify is left largely to the discretion of the trial court and its judgment will not be disturbed unless shown to have been plainly abused resulting in manifest error.' Point 8, Syllabus, State v. Wilson, 157 W.Va. 1036, 207 S.E.2d 174 (1974). Syllabus Point 3, State v. Butcher, 165 W.Va. 522, 270 S.E.2d 156 (1980)." Syl. Pt. 7, State v. Humphrey, 177 W.Va. 264, 351 S.E.2d 613 (1986)." Syl. Pt. 1, State v. Ayers, 179 W.Va. 365, 369 S.E.2d 22 (1988).

DISCUSSION

Appellant's third assignment of error appears to be that the trial judge abused his discretion when he prohibited defense counsel from questioning victim R.M. regarding certain facts that would demonstrate her inability to testify as a competent witness. Counsel for the Appellant misstates the record in representing that the prosecutor misinformed the Court that a motion for a competency hearing had not been requested.

On or about March 31, 2008, counsel for Appellant filed a "Motion for In Camera Hearing of State's Witness R.M. and any Other Minor Child that the State Intends to Call at Trial or Use Their Statements." Record, Vol. I at 221.

The Trial Court conducted a hearing on Defendant's motion on or about April 1, 2008, and entered an order on or about April 10, 2008, and addressed the Defendant's requests to seek an "*in camera*" hearing in the presence of the Defendant to determine whether the child witness is competent to take the stand, and whether the child understands the consequences of lying during a

trial."

The Court carefully considered Defendant's request and in an analysis of the applicable law correctly concluded that Defendant's motion did not seek the appropriate relief where the competency of the witness is in question or has been appropriately challenged and supported by sufficient facts/evidence from the record.

The Trial Court further stated in Footnote 1 of its April 10, 2008 Order that:

> If the Defendant wishes to file additional motions seeking alternative relief, the Court will consider them. The Court would caution, however, that argument of counsel cannot be considered as evidence. Record, Vol. 1, pg. 341-342.

The record reflects that upon questioning by R.M. on cross-examination by Mr. Alberty the following testimony occurred:

Q. Now, what happens if you lie today, do you know?

MS. WOOD: Your Honor, I'd just object.

MR. ALBERTY: On what grounds?

MS. WOOD: He's not raised the issue in a timely fashion. He cannot raise it now in the middle of the cross-examination of this nine-year-old child, Your Honor. It's improper.

MR. ALBERTY: Judge, I raised this issue before the child ever took the stand.

MS. WOOD: No, he did not, Your Honor. Not adequately. Do you want us to approach?

THE COURT: No.

MS. WOOD: It's improper.

THE COURT: Sustained.

MS. WOOD: Thank you.

Record, Vol. III, Trial Transcript, Vol. I-Cont., at 101.

The record clearly reflects that counsel for the Appellant failed to raise competency in a timely fashion. "An objection to competency should be made after the witness has been called and **before** the witness is sworn." Cleckley, F., Handbook on Evidence for West Virginia Lawyers, 4th Ed., §6-1(C)(1). See also State v. Hoke, 76 W.Va. 36, 84 S.E.2d 1054, (1915); United States v. Odom, 736 Fed.2d 104, (4th Cir. 1984).

Counsel for Appellant failed to adequately raise the issue of competency and at no time did he request a Rule 104(a) hearing to determine competency. Counsel for Appellant failed to file a written motion, containing an offer of proof, but instead chose to request an *in-camera* interview of the victim R.M. in the presence of the Defendant, which was properly denied by the Trial Court.

Section 61-8D-11(c) of the West Virginia Code provides in relevant part, "In any prosecution under this article, neither age nor medical past of the victim shall preclude the victim from testifying."

R.M. at the time of her testimony was 9 years old. The record reflects multiple disclosures to various individuals by R.M. of specific acts of sexual assault and sexual abuse by defendant. There is absolutely no evidence in the record of concerns regarding her competency to testify. Additionally, as the Appellant references, the Trial Court Judge questioned R.M. prior to her testimony and she demonstrated the ability to understand and give the required oath or affirmation related to truth telling.

Rule 601 of the West Virginia Rules of Evidence provides that, "Every person is competent to be a witness except as otherwise provided for by statute for these rules."

"Trial Judge is in the best position to evaluate infant's competency to testify; infant's demeanor and understanding of nature and affect of oath are far better determined through live examination by a Trial Judge than by appellate review of trial record." State v. Mallick, 457 S.E.2d. 482, 193 W.Va. 545 (1995).

There is simply no evidence in the record to suggest that the Appellant ever properly raised the issue of competency or presented evidence to suggest that the child victim R.M. lacked competence. The Trial Court properly exercised discretion.

D. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO RECUSE THE OHIO COUNTY PROSECUTOR'S OFFICE WHEN THE FACTS AS REPRESENTED BY APPELLANT WERE NOT TRUE, AND EVEN HAD THEY BEEN APPELLANT WOULD NOT HAVE BEEN ENTITLED TO HER REQUESTED RELIEF.

STANDARD OF REVIEW.

The decision of a trial court on a motion to disqualify a prosecutor, or his office, from prosecuting a criminal defendant is reviewed under an abuse of discretion standard. State v. Keenan, 213 W.Va. 557, 561, 584 S.E.2d 191, 195 (2003).

DISCUSSION.

Appellant complains that the Circuit Court committed error in denying her motion to disqualify the Ohio County Prosecuting Attorney's Office from prosecuting her. However, Appellant fails to point to any relevant facts which would lead any Court to a logical or rational conclusion that there existed any grounds whatsoever to grant her Motion.

In the underlying case, and in her Petition for Appeal, Appellant's overall complaint as to Judge Mazzone's failure to recuse the Ohio County Prosecutor's Office was that the Office of the Ohio County Prosecuting Attorney was prosecuting an abuse and neglect petition, in which Appellant

and Jack Jones were named as Respondents, at the "same time" that it was criminally prosecuting Appellant's co-conspirator Jack Jones for crimes of Domestic Violence perpetrated upon Appellant. See Petition for Appeal at 40 - 41, record, Vol. I at 69 - 71. Appellee then filed a "Motion to Supplement" with this Court, containing the Affidavit of Magistrate Court Clerk Gerald Ames which reveals that the prosecution of Jack Jones for crimes against Appellant pre-dated by months and in some case years the filing of any abuse and neglect petition against Appellant and Mr. Jones. Since the filing of the "Motion to Supplement" Appellant has apparently abandoned this particular false allegation of "fact" upon which she bases this ground of error.

It is difficult to determine exactly the facts in the record upon which Appellant is now attacking the judgment of the Circuit Court, but it appears the facts lie in three separate areas: 1) that Assistant Prosecutor Gail W. Kahle met with Appellant at the time he was prosecuting Jack Jones for crimes of domestic violence against her; 2) that there existed reports made in 2003 that Jack Jones may have sexually molested R.M[5].; and 3) Appellant counsel's speculation that Appellant was not given her Miranda warnings prior to her testimony in the separate abuse and neglect proceeding[6]. Appellant's Brief at 39-40. This is the closest recitation to any underlying "facts" pointed to by Appellant giving rise to error.

This assignment of error is without merit. The preeminent West Virginia case concerning

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[5]The 2003 reports as a grounds for disqualification of the Prosecutor's Office are being raised for the first time in Appellant's Brief. No such argument or suggestion appears in the record below or Appellant's Petition for Appeal.

[6]Appellant had equal access to all transcripts from the related Abuse and Neglect proceedings and every opportunity to submit any evidence she desired before the Court for consideration. This "ground" for objection to the Court's ruling is raised for the first time in Appellant's brief; this was not even raised in her Petition for Appeal.

prosecutorial disqualification is Nicholas v. Sammons, 178 W.Va. 631, 363 S.E.2d 516 (1987). At syllabus point 1, this Court held:

> Prosecutorial disqualification can be divided into two major categories. The first is where the prosecutor has had some attorney-client relationship with the parties involved whereby he obtained privileged information that may be adverse to the defendant's interest in regard to the pending criminal charges. A second category is where the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question.

It is abundantly clear that there has never existed an attorney-client relationship between Appellant and any member of the Ohio County Prosecutor's Office. Appellant was identified as a complaining witness to domestic violence at the hand of Jack Jones in 2004 and 2005, and was treated appropriately by Assistant Prosecutor Gail W. Kahle. The only testimony or evidence offered by Appellant in support of her motion to recuse was a single question asked by her counsel, "Did Mr. Kahle advise you to put anything into the protection for abuse form that you were filling out when he saw you in the magistrate court?" (record, vol. III, transcript of February 11, 2008, hearing at 30-31) to which Appellant replied:

> A. Yes he did. I had a conversation with Mr. Kahle when I was filling out the protection order and he told me to make sure that I put the part about where Jack had put the knife to my throat and, also Jack ripped my pants. The button come off and ripped my pants. He told me to make sure that I put that in there. And I remember he chased me up the steps. I was going over this with him and he told me to put that, so that's - -
> MR. ALBERTY: I have no further questions.

Id at 32-33. This is ***all*** the evidence presented to the trial court in support of the Appellant's motion to recuse the Ohio County Prosecutor's Office.

Ohio County Prosecuting Attorney Scott Smith *attempted* to make a record of the criminal cases involving Jack Jones as Defendant and Jessica Morris as victim, as well as Protection Orders

involving the same two, by introducing the subject Court files at the February 11, 2008, hearing to which Appellant's counsel objected.[7] Id at 39 - 41. After an extended discussion regarding Appellant Counsel's objection the Circuit Court disallowed the State's sought introduction of the subpoenaed files stating "I believe that enough of a record exists after I've had an opportunity to review the applicable law for the Court to make a decision." Id at 43.

Thus, the Circuit Court was given misleading evidence by Appellant in her court filings regarding the relationship and timing of unrelated criminal and civil proceedings, and at hearing the Appellant testified that an Assistant Prosecutor suggested that she recite incidents of violent behaviors in her application for a domestic violence protective order. That is it. There exists in the record no other evidence of any fact (or misrepresentation of "fact" such as contained in Appellant's Motion to Recuse and Petition for Appeal) that could lead a rational jurist to believe that a relationship existed which could lead to a disqualifying conflict.

In its Order denying Appellant's Motion to Recuse the Circuit Court addressed each of the three areas raised by Appellant suggesting that the Office of the Prosecutor be recused: 1) that there existed an attorney/client relationship between Gail W. Kahle and Jessica Morris; 2) that an appearance of impropriety existed; and 3) that the Office of the Prosecutor somehow acquired evidence through prior dealings with Jessica Morris that could be used against her in the multiple

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[7]Despite the fact that the basis of the Motion to disqualify was the alleged involvement of the Ohio County Prosecutor's Office in certain criminal cases, Appellant's counsel seemed surprised and/or confused to the State seeking introduction of the content of those very files by virtue of a *duces tecum* subpoena to the Circuit Clerk: "I would object to that fact that the files are even here. I don't think that a normal attorney like myself would have the ability to bring a file here. I get photocopies, Your Honor. It would've been nice when I was drafting this if I would've known the files were going to be sitting here for my every dally answer and desire, but I would ask those files be taken back to the clerk's office where they're supposed to be kept." Id at 41.

count sexual assault/incest trial. The Circuit Court analyzed all three of these areas and properly found that there was simply no evidence to support a removal order. See Record at 132-136.

There plainly is no evidence in the record to suggest that a "conflict" or "appearance of impropriety" existed to warrant a recusal of the Office of the Ohio Count Prosecuting Attorney. Given the fact that the Appellant presented to Judge Mazzone no real evidence of a conflict, together with misinformation regarding the timing and prosecution of unrelated civil and criminal matters, one cannot conclude that the Judge abused his discretion in denying the motion.

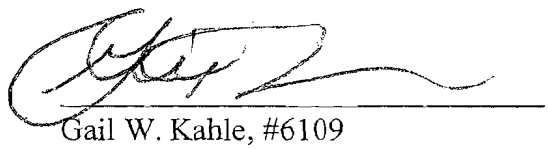
IV.

CONCLUSION AND RELIEF REQUESTED.

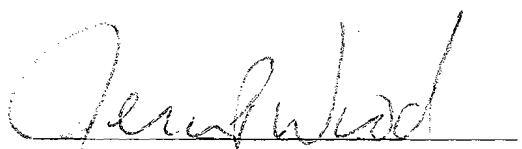
The underlying case consisted of the real life horror story of a young girl who was repeatedly raped and brutalized at the hand of her mother and her mother's boyfriend. The Circuit Court, recognizing the serious nature of the allegations and the enormity of the ramifications resting upon the outcome of the matter devoted serious attention and cautious deliberation to all matters placed before it requiring legal rulings. The Circuit Court committed no error in any of its rulings, and the multiple convictions of the Appellant are well founded in fact and in law.

WHEREFORE, for all of the foregoing reasons, as well as for reasons which may appear in the record, the State of West Virginia respectfully prays that the Honorable Court enter an Order affirming the final judgment of the Circuit Court of Ohio County West Virginia.

Respectfully submitted
State of West Virginia, by:



Gail W. Kahle, #6109



Jenna Perkins Wood, #6983

Assistant Prosecuting Attorneys
Ohio County Prosecutors Office
1500 Chapline Street
Wheeling, WV 26003
(304) 234-3631

CERTIFICATE OF SERVICE

I, Gail W. Kahle, do certify that service of the foregoing "Breif of Appellee" was had by mailing a true copy hereof to counsel for Appellant on this this the 29th day of April 2010, postage prepaid, and addressed as follows:

Michael Alberty, Esq.
63 - 15th Street
Wheeling, WV 26003

Gail W. Kahle